

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 17, 2007

STEPHEN ANTHONY SCOTT v. STATE OF TENNESSEE

Appeal from the Circuit Court for Montgomery County
No. 40200176 Michael R. Jones, Judge

No. M2007-00030-CCA-R3-PC - Filed January 7, 2008

Petitioner, Stephen A. Scott, was convicted by a Montgomery County jury of one count of aggravated robbery, one count of attempted aggravated robbery, one count of especially aggravated kidnapping, two counts of aggravated kidnapping, one count of kidnapping, and one count of attempted robbery. Petitioner appealed his convictions and sentence. *See State v. Stephen Anthony Scott*, No. M2004-00927-CCA-R3-CD, 2005 WL 1334399 (Tenn. Crim. App., at Nashville, Jun. 7, 2005), *reh'g denied*, (Tenn. Crim. App., at Nashville, Jul. 18, 2005), *perm. app. denied*, (Tenn. Oct. 31, 2005). On appeal, this Court merged several of Petitioner's convictions and remanded for corrected judgments. *Id.* at 8. Further, this Court remanded for resentencing on one count of aggravated kidnapping because the trial court failed to apply a statutory mitigating factor. *Id.* This Court subsequently denied a petition for rehearing on July 18, 2005, and the Tennessee Supreme Court denied permission to appeal on October 31, 2005. Subsequently, Petitioner sought post-conviction relief on the basis of ineffective assistance of counsel at trial. After a hearing, the post-conviction court dismissed the petition. Petitioner filed a timely notice of appeal. On appeal from the dismissal of the post-conviction petition, Petitioner argues that trial counsel was ineffective by failing to investigate witnesses and prohibiting Petitioner from participating in jury selection. Because we determine that the record supports the post-conviction court's ruling that trial counsel was not ineffective, we affirm the post-conviction court's dismissal of the post-conviction petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Stephen Anthony Scott.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel West Harmon, Assistant Attorney General; John Carney, District Attorney General, and Daniel Brollier, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The facts supporting the petitioner's underlying conviction were summarized by this Court on direct appeal as follows:

On the evening of December 15, 2001, Laurie Goodman and Jason McClain were visiting at the home of Jay and Mary Hutchison. At about 11:00 p.m., Goodman and McClain left the residence. On his way to take Goodman home, McClain stopped to pick up the defendant to pursue a marijuana transaction.

The defendant directed McClain to drive to an apartment complex where the marijuana was supposedly located. Upon arrival, the defendant exited the vehicle and proceeded into the complex to retrieve the marijuana. However, he returned with a gun and demanded money from both Goodman and McClain. Since the couple could only produce less than ten dollars, the defendant became agitated and slapped McClain in the ear with the gun. The defendant then forced McClain to drive him to get additional money.

Unsure of a solution, McClain phoned the Hutchisons and drove back to their home. Jay Hutchison walked outside his home to meet McClain. With McClain at gunpoint, the defendant then demanded money from Jay Hutchison. However, Hutchison made it back inside his home and told his wife to phone the police.

The defendant then drove away with Goodman and McClain inside the car. Briefly thereafter, the defendant slammed on the brakes, demanded the watch and necklace of McClain, and ran off, leaving the couple sitting in the car.

Goodman and McClain returned to the Hutchisons' residence at roughly the same time the police arrived. Hesitant to reveal their involvement in the underlying marijuana transaction, Goodman and McClain told police that they did not know the defendant and were just giving him a ride.

At trial, these facts were reflected in the testimonies of Goodman, McClain, and the Hutchisons. However, the cross-examination of Goodman and McClain brought out some inconsistencies. According to McClain, Goodman made an informed decision to accompany him and the defendant to retrieve the drugs. McClain also stated that the defendant first produced the gun while inside the vehicle. According to Goodman, she was unaware that she was accompanying McClain in a drug transaction and believed that the defendant first showed the gun outside the vehicle. In addition, the defense attempted to impeach the testimonies of

Goodman and McClain by arguing that their initial statements to police were false. According to Detective Ty Burdine of the Clarksville Police Department, the victims initially stated that they met the defendant at an Amoco, where they stopped to use the restroom.

McClain responded, “I didn’t want to admit that [a marijuana sale] was what was going on because I was afraid of being in trouble.” Goodman testified that she did not come forward with the truth earlier because “McClain was all worried about previous things he had done and I didn’t know what to do. I was scared.”

The defendant testified that he was the one selling the drugs for McClain and that McClain was seeking his money on the evening of December 15, 2001. The defendant denied ever having a gun or going to the Hutchison residence that night.

Id. at *1-2.

Evidence at the Post-conviction Hearing

At the hearing on the post-conviction petition, Petitioner’s mother, Lisa Darlene Scott, testified that she had seen Petitioner’s trial counsel but did not really know him and denied having any conversations with him.

Petitioner testified that prior to trial, he met with trial counsel three or four times and that each meeting lasted approximately five minutes. Trial counsel was appointed to represent Petitioner in “January 2003” after another attorney was removed from the case because he and Petitioner were not getting along “communication-wise.”

Petitioner testified that he gave trial counsel the names of several potential witnesses, including John Ferdinand, Ahmad Scott, a woman named Veronica, and Petitioner’s mother. Petitioner admitted that neither Mr. Ferdinand nor Mr. Scott were believable witnesses, especially given the fact that Mr. Scott was incarcerated; however, Petitioner felt that Veronica would have been a good witness if she testified truthfully. Petitioner admitted that he did not know whether trial counsel spoke with Veronica prior to trial.

Petitioner thought that he made it through the eleventh grade in school and testified that, since his incarceration, he had received his GED. Petitioner admitted that as a juvenile he was in court two or three times and spent some time in Taft Youth Development Center.

The night prior to trial, trial counsel came to visit with Petitioner prior to lock down. According to Petitioner, trial counsel advised him during that meeting that his trial started the next day, but they did not discuss strategy. However, Petitioner testified that he did not think he was going to trial on the day the trial was scheduled to begin. Petitioner thought that he was going to court for “a bond reduction hearing or something like that.” When Petitioner realized that his

appearance in court was for trial, he “wasn’t prepared so you know, we didn’t talk about anything so I just went along with what he was doing.” Petitioner further testified that he did not participate in the jury selection and did not discuss any potential jurors or witnesses with trial counsel. Petitioner also admitted that he did not tell trial counsel that he wanted to have a say in the jury selection.

Petitioner claimed that after the State rested its case, he and trial counsel discussed only his right to testify. According to Petitioner, he was unaware that his juvenile “convictions” could be discussed if he chose to testify. Petitioner stated that he took the stand at trial and admitted that the State did not inquire into his juvenile “convictions.”

Petitioner characterized trial counsel’s representation as follows:

I mean the only thing I can really say is you know, he ain’t - I feel like he ain’t tried to help me. You know, he ain’t tried to inform me or you know, what part I could have played you know, in helping myself or you know, going to talk to the D.A. trying to work a deal or this is your best move, you know, you shouldn’t do this, you shouldn’t do that. He ain’t tell me nothing, so I really don’t know nothing.

Trial counsel for Petitioner testified that he was appointed to represent Petitioner in October of 2002. At the time he was appointed to represent Petitioner, trial counsel had been practicing law for over twenty years and had handled over 300 jury trials.

According to trial counsel, he met with Petitioner in December of 2002 for the first time. When he met with Petitioner, he had already had the opportunity to review the State’s discovery. Trial counsel gave Petitioner a copy of the discovery and discussed the charges with Petitioner. Prior to trial, trial counsel met with Petitioner six to eight times. According to trial counsel, there was even a two-day period of time when he met with Petitioner four or five times for a few minutes each time in order to gather information relating to his case.

Trial counsel stated that either he or his investigator spoke with the potential witnesses whose names were provided by Petitioner, including John Ferdinand, Petitioner’s mother and Veronica. Trial counsel did not speak with Mr. Scott because he was incarcerated. Trial counsel admitted that he did not subpoena any of the witnesses but testified that there was no need for their testimony. Trial counsel stated that the witnesses could only testify that Petitioner and one of the victims knew each other prior to the incident.

Trial counsel testified that Petitioner gave him enough information about the case to formulate a defense. He used the information to advise Petitioner, and the two jointly decided to reveal information about inconsistencies in the State’s witnesses’ statements prior to trial in an attempt to negotiate a plea agreement. The information was helpful during negotiations with the State, but all offers involved some form of incarceration, and the plea offers went unaccepted.

During that time, trial counsel continued to communicate with Petitioner about the plea offers, but ultimately the case went to trial.

Trial counsel also stated that he spoke with Petitioner about the decision to testify at trial. Because of the potential lack of credibility of the two victims, trial counsel wanted to take a wait-and-see approach regarding Petitioner's testimony. Trial counsel remembered discussing the matter with Petitioner the weekend prior to trial.

Trial counsel testified that he did not have a set procedure regarding jury selection. He did not always show the jury list to his clients but usually asked them if they recognize anyone or know anyone in the jury pool. Trial counsel also made it a habit to have his clients write down any questions or concerns that they had during jury selection because he was unable to listen to the potential jurors and his client at the same time. In this particular case, trial counsel did not recall Petitioner asking any questions during jury selection. In fact, trial counsel recalled that he did not even use all of his challenges to potential jurors.

All in all, trial counsel felt that he did a good job of representing Petitioner at trial, especially when cross-examining one of the State's witnesses who was having trouble telling the truth. Trial counsel stated that he did not usually like for his clients to testify because they "dig holes far more than they fill them in." In Petitioner's case, however, trial counsel did not make a strong recommendation one way or the other. Petitioner ultimately made the decision to testify.

At the conclusion of the hearing, the post-conviction court took the matter under advisement. The post-conviction court later denied the petition and issued written findings of fact and conclusions of law, which stated, in pertinent part:

At the post-conviction hearing, [Petitioner] stated that he did not participate in the voir dire process. . . . Petitioner summarized his testimony about voir dire as follows - "just not right." Counsel for [Petitioner] argued that voir dire is such an integral part of the trial, that the court should grant the petition without any showing of prejudice.

Further at the post-conviction hearing, [Petitioner] testified that [trial counsel] did not give him proper advice concerning his right to remain silent. . . . The testimony of [Petitioner] at trial did not affect the outcome of the trial in the court's opinion. His testimony did place him in the vehicle, but it also provided a complete defense if the jury believed him. The testimony of [Petitioner] failed to establish any ground upon which the court should grant his post conviction petition. [Petitioner] failed to establish that the advice given by [trial counsel] was not proper.

. . . .

Without the testimony of [Petitioner], all of the evidence indicated that he was guilty of all offenses. [Petitioner] can not now complain that he should have elected to remain silent.

The voir dire process is not such a fundamental right that each question asked and each challenge exercised or not exercised has to be approved by the defendant and his statements placed on the record. Counsel for the defendant did not provide the court with any case law that requires this.

Analysis

Post-Conviction Standard of Review

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or reevaluate the evidence nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues

of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo” with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

On appeal, Petitioner argues that trial counsel was ineffective because he: (1) did not fully interview and investigate the witnesses prior to trial; and (2) did not allow Petitioner to participate in jury selection.

Failure to Interview and Investigate the Witnesses

On appeal, Petitioner claims that trial counsel did not fully interview and investigate the witnesses prior to trial. Specifically, Petitioner points to the fact that trial counsel could not remember if he “specifically investigated the claims that the alleged robbery/kidnapping had really been a drugs transaction,” and found witnesses to substantiate that claim.

Since Petitioner did not call to testify any of the witnesses he claims counsel failed to adequately investigate, the evidence at the post-conviction hearing did not indicate what the testimony of the proposed witnesses would have been at trial or how their testimony would have helped Petitioner’s case. In fact, at the post-conviction hearing, the post-conviction court was so confused by Petitioner’s statements about the proposed witnesses that the court directly questioned Petitioner in order to try to understand how the potential witnesses were important to the case. In the end, Petitioner testified that he did not know how the witnesses would testify but that he hoped that they would be able to help him. Trial counsel contradicted Petitioner’s assertions, testifying that either he or his investigator spoke with all of the potential witnesses provided by Petitioner except for Mr. Scott, who was incarcerated. After meeting with the witnesses, trial counsel did not feel it necessary to subpoena them for trial, because there was no need for their testimony. According to trial counsel, the only information that the witnesses would provide would be that Petitioner and one of the victims knew each other prior to the date of the incident.

In denying the petition, the post-conviction court found the testimony of trial counsel to be credible with regard to the interviewing of potential witnesses. As stated above, “questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact,” and the post-conviction court’s credibility determinations are conclusive on appeal unless the evidence preponderates against them. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). The evidence does not preponderate against the

post-conviction court's credibility determination. Moreover, and perhaps more importantly, Petitioner failed to present the witnesses at the post-conviction hearing. When a claim of ineffective assistance of counsel is predicated upon a failure to investigate, the petitioner is obligated to show what a reasonable investigation would have revealed. *Owens v. State*, 13 S.W.3d 745, 756 (Tenn. Crim. App. 1999). Petitioner has failed to prove by clear and convincing evidence that trial counsel was ineffective in failing to interview witnesses. This issue is without merit.

Participation in Jury Selection

Next, Petitioner argues that trial counsel prohibited him from participating in jury selection by having "no discussions about potential jurors" with Petitioner and because trial counsel did not explain to Petitioner what was going on during jury selection.

At the post-conviction hearing, Petitioner indicated that he wanted to be involved in the jury selection process at trial. However, Petitioner did not testify that he had made any attempt to communicate to trial counsel that he wanted to be involved in selecting the jury. Petitioner testified that he did not make any comments to trial counsel about any of the potential jurors and did not think that it was his responsibility to say anything about the selection process. Petitioner stated that there were one or two jurors who were stricken from the jury that he would have kept but that he really could not remember exactly. Trial counsel explained that his procedure was to have his clients write down any questions or concerns that they have during jury selection because he is unable to listen to the potential jurors and his client at the same time. Trial counsel did not recall petitioner raising any questions or concerns about potential jurors during the selection process.

Petitioner has not presented clear and convincing evidence that trial counsel was ineffective during jury selection or prohibited him from participating in the jury selection process. This issue is without merit.

Conclusion

Because Petitioner has failed to prove that trial counsel's representation fell below an objective standard of reasonableness or that he was prejudiced by his trial counsel's actions, the post-conviction court properly dismissed the petition for post-conviction relief. The judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE